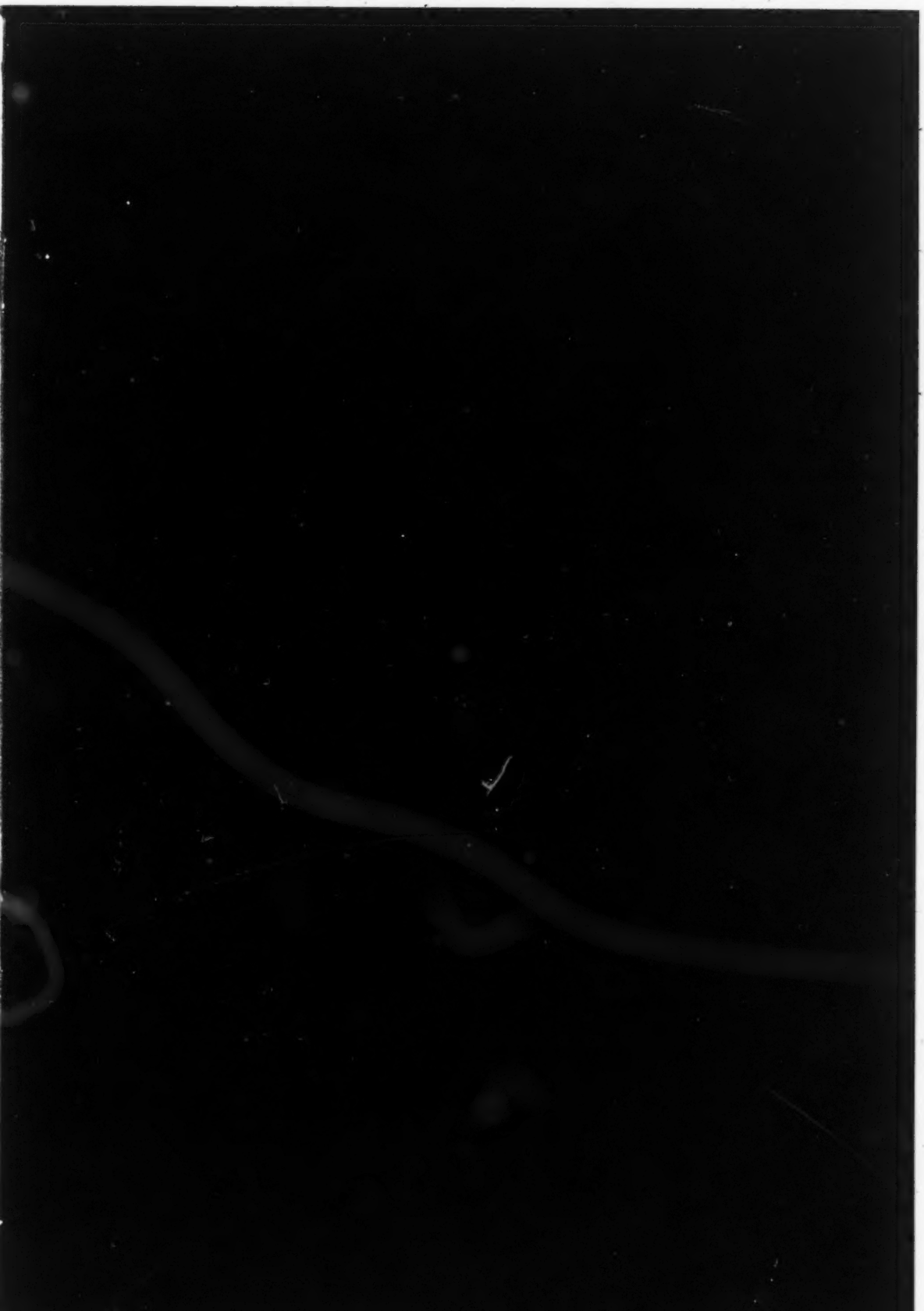

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 101

UNITED STATES OF AMERICA, APPELLANT

v.

MARSHALL & ILSLEY BANK STOCK CORPORATION, MARSHALL & ILSLEY BANK, NORTHERN BANK, AND THE BANK OF COMMERCE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

On April 17, 1967, the Court invited the government to submit its views as to the bearing on the instant case of the Court's opinion, announced that day, in the *Houston Bank* case (*United States* v. *First City National Bank of Houston*, No. 914, this Term, and *United States* v. *Provident National Bank*, No. 972). As explained below, we believe the opinion confirms our view that the district court erred in dismissing the complaint in the present case for want of jurisdiction.

This case involves the acquisition of more than 80 percent of the voting stock of three banks in Milwaukee, Wisconsin, by a bank holding company.

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Each acquisition was approved by the Federal Reserve Board under the Bank Holding Company Act of 1956, 12 U.S.C. 1841–1848. On March 2, 1961, the United States filed suit under Section 7 of the Clayton Act, 15 U.S.C. 18, seeking divestiture of the stock (J.S. App. 42a–49a). Following a lengthy trial on the merits, the district court dismissed the case, *sua sponte* (J.S. App. 38a; see J.S. 2a), on the ground that the jurisdiction of the district courts under Section 15 of the Clayton Act to enforce Section 7 against bank holding company acquisitions had been supplanted by the administrative remedies of the Bank Holding Company Act. In the court's view, the latter conferred exclusive jurisdiction on the Federal Reserve Board to approve bank holding company acquisitions, and hence such acquisitions could be questioned only by seeking review of the Board's decisions in the courts of appeals, pursuant to Section 9 of the Holding Company Act, 12 U.S.C. 1848 (J.S. 1a–37a).

The question presented in the jurisdictional statement is whether the Board's approval under that Act immunizes an acquisition from challenge by the United States in a suit under Section 7 of the Clayton Act. The *Houston Bank* opinion is relevant because there this Court reaffirmed the strong policy against implying antitrust immunity from a scheme of administrative regulation. At issue was the Bank Merger Act of 1966, 80 Stat. 7, 12 U.S.C. 1828(c), which provides for initial submission of bank-merger proposals to the appropriate banking agency.[1] It was

[1] The Comptroller of the Currency, the Federal Reserve Board, or the Federal Deposit Insurance Corporation.

argued that the Act in effect repealed the Clayton Act as applied to bank mergers, so that (1) any action challenging a bank merger on the ground that it unlawfully lessened competition could be brought only under the Bank Merger Act of 1966, and (2) the district court in such an action was limited to deciding whether there was substantial evidence in support of the administrative agency's determination approving the merger. This Court rejected both contentions. It held that an action attacking a bank merger as anticompetitive should be brought under the antitrust laws, not the Bank Merger Act, and that the antitrust court must make its own independent determination of the legality of the merger, without according any presumptive weight to the initial administrative determination.

The reasoning underlying the *Houston Bank* decision reinforces the arguments set forth in our jurisdictional statement herein. The decision of the court below was bottomed on its belief that the Holding Company Act's provision for administrative approval of bank holding company acquisitions by the Federal Reserve Board (even though no hearing is required) and for judicial review of Board decisions in the courts of appeals worked a *pro tanto* repeal of the Clayton Act. The same reasoning, however, was rejected by the Court in *Houston* (Slip Opinion, pp. 5, 7):

> Prior to the 1966 Act administrative approval of bank mergers was necessary. Yet in an antitrust action later brought to enjoin them we never stopped to consider what weight, if any, the

agency's determination should have in the antitrust case. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321; *United States* v. *First National Bk. & Tr. Co.*, 376 U.S. 665. Traditionally in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure. *United States* v. *Radio Corporation of America*, 358 U.S. 334; *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651; *United States* v. *Philadelphia National Bank, supra*; *United States* v. *First National Bk. & Tr. Co., supra*. We have found no indication that Congress designed judicial review differently under the 1966 Act than had earlier obtained.

* * * * *

Immunity from antitrust laws "is not lightly implied." *California* v. *Federal Power Commission*, 369 U.S. 482, 485. And the grant of administrative power to give immunity unless the agency's decision is arbitrary, capricious, or unsupported by substantial evidence, would be a long step in that direction. Moreover, the Comptroller's action is informal, no hearings in the customary sense being held prior to the 1966 Act (*United States* v. *Philadelphia National Bank, supra*, at 351) and none being required by Congress in the 1966 Act. We would therefore have to assume that Congress made a revolutionary innovation by making administrative action well nigh conclusive, even though no hearing had been held and no record in the customary sense created.

> The courts may find the Comptroller's reasons persuasive or well nigh conclusive. But it is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal. That was the practice prior to the 1966 Act; and we cannot find a purpose on the part of Congress to change the rule.

The Federal Reserve Board's role under the Bank Holding Company Act of 1956 is analogous to that of the Comptroller and other banking agencies under the Bank Merger Act of 1966, and for the reasons outlined in *Houston Bank* it is plain, we submit, that Congress never intended the Board's decisions under the former Act to preempt the antitrust jurisdiction of the district courts.

In the light of the *Houston* case and the authorities discussed in our jurisdictional statement, we renew our contention that the district court plainly erred in dismissing this case for lack of jurisdiction.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

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